A Practitioner's Approach to Examining Title IX

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A PRACTITIONER’S APPROACH TO EXAMINING

TITLE IX

By Jordan Tegtmeyer and Ashley Nicoletti

INTRODUCTION

With the 52nd anniversary of Title IX happening this spring amid recent issues related to gender equity in college sports, we thought it important to examine Title IX’s three-part test. The past year’s Title IX stories indicate a gap in understanding around compliance with its three-part test. Whether it be disparate accommodations for NCAA women’s basketball and softball players or institutions citing Title IX as one of the rationales for dropping sports, Title IX has been all over the news. This article seeks to establish a legal and regulatory framework practitioners can use when thinking about compliance with Title IX’s three-part test on their own campus.

Developing a workable compliance model that is grounded in legal and statutory understanding and is useful for practitioners in the space was of the utmost importance. After reviewing court cases, statutes, and legislative text, we developed the following framework for navigating compliance with Title IX’s three-part test. This framework is
not meant to be all-inclusive but to highlight key data points that institutions could use to access compliance at a high level. The results of a review using this framework could provide a good starting point for a deeper dive in an institution’s athletic department gender equity context.

**BACKGROUND AND CONTEXT**

Prior to Title IX’s enactment, there was a profound lack of opportunities for women to pursue college athletics. While the number of women collegiate athletes has increased from fewer than 30,000 around the time of Title IX’s passage to over 210,000 today, but only account for 44% of all NCAA athletes.\(^1\) Despite this major increase in opportunity for women athletes since its passage, improvements are still necessary for true equity. While Title IX has led to greater equity in terms of participation rates, disparity of opportunities provided to men and women remains an ongoing issue.\(^2\) Even at the highest level of intercollegiate sports, the NCAA’s Division I-FBS (Football Bowl

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\(^2\) *Number of NCAA college athletes*, supra note 1.
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Subdivision), women still receive fewer opportunities than men, even though they now account for the majority undergraduate population on most college campuses.³

Given this status for women as the majority in most undergraduate populations, institutions are under significant pressure to address gender disparities in their athletic participation.⁴ While the evolution of this gender composition took decades to unfold, institutions did not keep up with the participation opportunities they offered to the different genders. This demographic shift, coupled with the large number of men’s participation opportunities allocated to football, usually around 100, makes it hard for schools to be in compliance with Title IX.⁵ Fully

³ JENNIFER LEE HOFFMAN, COLLEGE SPORTS AND INSTITUTIONAL VALUES IN COMPETITION, 113-114, (1st ed., 2020); Number of NCAA college athletes, supra note 1.


⁵ Averett & Estelle, supra note 4; Brake, supra note 4; Andrew Zimbalist, Gender equity in intercollegiate athletics: Economic considerations and possible fixes, in THE OXFORD HANDBOOK OF SPORTS ECONOMICS: VOLUME 1: THE ECONOMICS OF SPORTS 404, 410 (Leo H. Kahane & Stephen Shmanske, eds. 2012).
recognizing the impact these two factors have on an institution’s ability to comply with Title IX is critical to moving forward with a more equitable athletic department.

UNDERSTANDING TITLE IX

The Title IX regulations provide that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise discriminated against in any interscholastic, intercollegiate, club or intramural program offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”⁶ This means that almost all institutions of higher education are bound by these regulations and, by extension, their athletic programs. As a recipient of educational funding, any institution “which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal opportunity for members of both sexes.”⁷ As an institution thinks about its athletic program’s compliance with Title IX, it should think through these factors that courts have used to evaluate equal opportunities:

⁶ 34 C.F.R. § 106.41(a).
⁷ 34 C.F.R. § 106.41(c).
1) Whether the selection of sports and levels of competition
effectively accommodate the interests and abilities of members
of both sexes;
2) The provision of equipment;
3) Scheduling of games and practice time;
4) Travel and per-diem allowances;
5) Opportunity to receive coaching and academic tutoring;
6) Assignment and compensation of coaches and tutors;
7) Provision of locker rooms, practice and competitive facilities;
8) Provision of medical and training facilities and services;
9) Provision of housing and dining facilities and services; and
10) Publicity.⁸

In addition to the above factors, an “institution may violate Title
IX solely by failing to accommodate the interests and abilities of student
athletes of both sexes.”⁹ A student can allege an institution is non-
compliant with Title IX. Courts have historically considered three parts

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⁹ Kelley v. Bd. of Trs., 35 F.3d. 265, 268 (7th Cir. 1995).
When analyzing whether institutions have violated Title IX in regard to athletics:

1. Whether intercollegiate-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.\(^\text{10}\)

Therefore, to achieve compliance with Title IX’s requirements to provide equal opportunities, institutions must satisfy one of the above three parts. Part one offers a presumption of compliance and offers an

\(^{10}\) Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-88 (1972); Boulahanis, 198 F.3d at 635; Mansourian v. Regents of the Univ. of Cal., 602 F.3d 957, 965 (9th Cir. 2010).
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affirmative defense to claims under Title IX. If an institution succeeds in asserting this defense, the plaintiff must demonstrate that the defense is a mere pre-text.\footnote{Cook, 802 F. Supp. at 737, 744 (1992). see also Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002); Mansourian, 602 F.3d at 957, 964; Barrett, 2003 U.S. Dist. LEXIS 21095, at 17.}

Title IX includes an exception for separate teams:

A recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.\footnote{34 C.F.R. § 106.41(b).}
I. Substantially Proportionate

Courts have held that the burden of proof is on the accuser to establish noncompliance with prong one under Title IX. This usually entails a female athlete suing an institution for not offering her the opportunity to participate in intercollegiate athletics, as the institution has done for male students. Title IX does not require an institution to have co-ed teams or a women’s team for every men’s team.13 “The purpose of Title IX is to prohibit educational institutions from discriminating on the basis of sex, not to ensure that athletic opportunities available to women increase.”14 Instead, in order to effectively accommodate athletic interests and opportunities, a university may distribute athletic opportunities in numbers that are substantially proportionate to the gender composition of their student bodies, i.e. their respective rates of enrollment of undergraduate full-time students.15 This distribution of athletic opportunities depends on the institution’s enrollment size and is done on a case-by-case analysis. Each institution should think about its

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13 Kelley, 35 F.3d at 271.
14 Id.
15 Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-88 (1972); Cohen v. Brown Univ. 101 F.3d 155, 173 (1st Cir. 1996); see also Chalenor, 291 F.3d 1042, 1048; Biediger v. Quinnipiac Univ., 691 F.3d 85, 93 (2d Cir. 2012); Ng v. Bd. of Regents of the Univ. of Minn., 64 F.4th 992, 995 (8th Cir. 2022); Neal v. Bd. of Trs., 198 F.3d 763, 770 (9th Cir. 1999).
own student body to figure out the participation opportunities that make the most sense.

In determining substantial proportionality, the courts and the Department of Education determine the number of participation opportunities afforded to both male and female athletes.\textsuperscript{16} The Department of Education identifies participants as those athletes:

\begin{enumerate}
\item Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
\item Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
\item Who are listed on the eligibility or squad lists maintained for each sport; or
\item Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.\textsuperscript{17}
\end{enumerate}

\textsuperscript{16} \textit{Biediger}, 691 F.3d 85 at 93.
\textsuperscript{17} Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-88 (1972).
The department looks only at full-time undergraduate students in determining enrollment.\textsuperscript{18} When counting participants, courts have held that counting unfilled slots to satisfy equal opportunity obligations under Title IX is illusory and they prohibit such practices in determining substantial proportionality.\textsuperscript{19} Not counting unfilled slots addresses potential “phantom” participation opportunities, where opportunities are not really available but still technically exist on paper.

As noted, courts have conclusively held that Title IX is not violated if the percentage of student athletes of a particular gender is substantially proportionate to the percentage of students of that gender in the general student population.\textsuperscript{20} Courts have held that substantial proportionality may be achieved even when application of these rules results in the elimination of over-represented gender programs, as long as there remains a substantial proportionality between that gender’s enrollment and their participation in athletics.\textsuperscript{21} Courts have held that disparity percentages ranging from 10\% to 20\% are not substantially


\textsuperscript{19} Cohen v. Brown Univ., 101 F.3d at 167.

\textsuperscript{20} Kelley v. Bd. of Trs., 35 F.3d. 265, at 270 (7th Cir. 1995); see also Chalenor, 291 F.3d at 1042, 1048; Neal, 198 F.3d 763 at 770.

\textsuperscript{21} Kelley, 35 F.3d. 265 at 270; Cohen v. Brown Univ., 101 F.3d at 185-187; Chalenor, 291 F.3d; Neal, 198 F.3d 763 at 769-770.
proportionate in accordance with prong one.\textsuperscript{22} Title IX does not mandate strict numerical equality between gender balance of a college’s athletic program and the gender balance of its student body but does allow use of statistical evidence to assess the level of interest in sports.\textsuperscript{23}

These cases have found that a variance of 3-5\% is tolerable to the courts. Given fluctuations in both enrollment and athletic participants, institutions would be wise to guard against using this variance tolerance for anything other than navigating year-over-year changes in campus populations.

\textit{II. History and Continuing Practice of Expansion}

If a student can show that an institution is not offering substantially proportionate opportunities to both genders, universities may also demonstrate a history and continuing practice of program expansion for the underrepresented sex to remain compliant under Title IX.\textsuperscript{24} The part two analysis focuses only on the underrepresented sex and


is only considered if an institution or university provides proportionately fewer athletic opportunities to members of one gender. This means if institutions are not offering women athletic opportunities proportionate to their undergraduate population, the institution must show a history and continuing practice of expanding opportunities to women. Institutions must meet both the history and continuing expansion elements to satisfy part two of the test.\(^{25}\)

The Department of Education has issued guidance stating that an institution may demonstrate a history or program expansion through the following:

- record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented gender;
- record of increasing the number of participants in intercollegiate athletics who are members of the underrepresented sex; and
- affirmative responses to requests by students or others for addition or elevation of sports.\(^{26}\)


\(^{26}\) Cantu, supra note 18.
The department also stated that an institution meets the “continuing” practice of program expansion by demonstrating the following:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.\(^\text{27}\)

Courts have rejected arguments that (1) schools should get credit for athletic programs established years previously; (2) proportionally smaller cuts for women compared to men satisfies the requirements of prong two; or (3) improvement in the quality of existing opportunities alone represents program expansion.\(^\text{28}\) In addition, courts have rejected

\(^{27}\) Cantu, supra note 18; see also Mansourian v. Regents of the Univ. of Cal., 602 F.3d 957, 968-973 (9th Cir. 2010); Barrett, 2003 U.S. Dist. LEXIS 21095 at *22-25.

schools claiming costs of program expansion as a defense to compliance under part two.\textsuperscript{29}

As outlined above, there are effective paths forward to navigating part two of the three-part test. First and foremost, the department should have a policy and practice in place for evaluating its sport offerings, potential elevation of club sports teams, and adding additional teams. Institutions should also be constantly adding opportunities for the underrepresented sex. This could simply be adding additional roster spots to current teams, as long as those “new” spots represent meaningful opportunities for the participants (and not packing the rosters with participants who will not play or will not receive adequate coaching). Lastly, having robust documentation about the evolution of the program’s sport offerings and their alignment with students’ interests and abilities would be critically important.

III. Full and Effective Accommodation

Universities are also deemed in compliance with Title IX if they have fully and effectively accommodated the athletic interests of the

underrepresented sex.\textsuperscript{30} Courts have held that part three of the Title IX framework is not used unless an institution is found to be out of compliance with parts one and two.\textsuperscript{31} Therefore, part three is only considered if an institution or university “provides proportionately fewer athletic opportunities to members of one gender and has failed to make a good faith effort to expand its program for the underrepresented sex.”\textsuperscript{32} If such a disparity is shown, the issue then becomes whether the athletic interests and abilities of the under-represented gender are fully and effectively accommodated by the institution.\textsuperscript{33}

According to the Department of Education, this third part of Title IX focuses on whether there are concrete and viable interests among the underrepresented sex that should be accommodated by the institution:

[I]f an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the

\textsuperscript{30} Boulahanis v. Board of Regents, 198 F.3d 633, 635 (7th Cir. 1999); Cook, 802 F.Supp 737 at 743; McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 301 (2nd Cir. 2004).

\textsuperscript{31} Cohen v. Brown Univ., 101 F.3d at 176.


\textsuperscript{33} Id.
recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated.\textsuperscript{34}

Generally, courts have focused their analysis on whether there are members of the underrepresented sex who have the interest and ability to participate in the athletic program but have not been given the opportunity. Or, as \textit{Cohen v Brown University} (1993) put it, “If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.”\textsuperscript{35}

The Department of Education has provided more concrete guidance on what satisfies the third part. The department analyzes the following:

(a) unmet interest in a particular sport;

(b) sufficient ability to sustain a team in the sport; and

(c) a reasonable expectation of competition for the team in their geographic area\textsuperscript{36}

\textsuperscript{34} Cantu, \textit{supra} note 18; see also Barrett, 2003 U.S. Dist. LEXIS 21095, *13-17.

\textsuperscript{35} Cohen \textit{v. Brown Univ.}, 991 F.2d 888, 879 (1st Cir. 1993); see also Roberts \textit{v. Colorado State Bd. of Agric.}, 998 F.2d 824, 831-32 (10th Cir. 1993); Cook, 802 F.Supp at 743; Barrett, 2003 U.S. Dist. LEXIS 21095, *13-17.

\textsuperscript{36} Cantu, \textit{supra} note 18; McCormick \textit{v. Sch. Dist. of Mamaroneck}, 370 F.3d 275, 289 (2d Cir. 2004).
If all three of the above criteria are met, the institution has failed to “fully and effectively” accommodate the underrepresented gender’s athletic interests. Moreover, if the institution has not achieved substantial proportionality and cannot show a continuing history of program expansion, only the unmet interest and abilities of members of the underrepresented gender will be considered. In other words, if an institution is not in compliance with part one or part two of the test, only then will part three be considered.

It should be noted that according to the Department of Education, recent elimination of a team for the underrepresented sex creates a presumption of noncompliance under prong three:

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

A. **Step 1: Unmet Interest**

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38 *Cohen*, 991 F.2d at 899.
39 Cantu, *supra* note 18.
The Department of Education will consider the following factors in assessing unmet interest:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators, and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular in interscholastic sports by admitted students.

Courts have rejected the argument that (1) men are “inherently” more interested in participating in athletics than women, and (2) biannual surveys evidencing lack of interest meets the requirements under Title IX. While courts have expressly negated the results of surveys, reasoning that such surveys do not measure interest that would have been demonstrated had more opportunity been given but only measure results.

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40 Id.
of past discrimination, the Department of Education issued a clarification in 2005 stating that universities may rely on surveys of current and admitted students. However, it appears that this 2005 clarification has since been revoked.\textsuperscript{42} Although guidance on how to determine unmet interest is still uncertain, it appears that more weight will be given to surveys with a higher response rate and overall efficacy of survey results will be determined by the nondiscriminatory design of the survey and its administration.\textsuperscript{43} What remains clear is that an institution may not rely solely upon a survey to determine whether students have the potential interest or ability to sustain an intercollegiate team. Institutions should use the following factors in evaluating the use of surveys to assess interest or ability: content of the survey, target population surveyed, response rates and treatment of nonresponses.\textsuperscript{44}

B. Step 2: Sufficient Ability

The Department of Education will consider the following factors in assessing sufficient ability to sustain a team in the sport:

\textsuperscript{42} U.S. Dep’t of Educ., supra note 32.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
● the athletic experience and accomplishments—in interscholastic, club, or intramural competition—of students and admitted students interested in playing the sport;
● opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
● if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.45

They have also said that “[n]either a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.”46 This rationale is based on the idea that the underrepresented gender cannot be expected to have “varsity team abilities” if they have not been provided benefits of varsity team participation.47

45 Id.
46 Cantu, supra note 18; Cook, 802 F.Supp at 747–48; McCormick, 370 F.3d at 295–96.
47 Cook, 802 F.Supp at 748; McCormick, 370 F.3d at 299-302.
C. Step 3: Reasonable Expectation of Competition

The Department of Education considers “whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region.” In determining available competition, courts will look at opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and (conference peers)
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

They also advise that “[u]nder the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.”

When thinking about part three, institutions should think of a few reference points from which to build a case for compliance (or

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48 Cantu, supra note 18.
49 Cantu, supra note 18; Cook, 802 F.Supp at 747.
50 Cantu, supra note 18.
highlight non-compliance). First, if an institution has a strong club sport that competes on the national level, this would likely indicate there is strong interest in a particular sport. If that sport is also not offered at the varsity level that would strengthen the case that there is an unmet interest on campus. Lastly, if this sport is also being offered by other members of the institution’s conference, this would seem to indicate a responsible expectation of competition. Public universities, particularly state institutions, should also pay attention to their sport offerings in relation to those of their state’s scholastic programs. If an institution is pulling the majority of its students from within its own state, its sport selections should take into account the scholastic sport participation of its home state.

SUMMARY

To summarize, each institution is different and should conduct its own review when trying to ascertain Title IX compliance within its athletic department. When navigating the three-part test, institutions can get a quick synthesis using this framework before doing a deep dive of their own. For part one, an institution’s athletic opportunities should be substantially proportionate to their undergraduate full-time study
breakdown (i.e. if women make up 55% of your full-time undergraduate population, they should make up 55% of your athletic opportunities).

If an institution is not compliant with part one, part two stipulates that the institution would have a history and continuing practice of expanding opportunities to the underrepresented sex, most likely women. Institutions should have continually added opportunities on the way to being substantially proportionate between the two genders. Given that Title IX has been around since the 1970’s, showing a history that would meet this requirement would be tough. If there are long gaps in adding opportunities, an institution is likely out of compliance. As a baseline, an institution should have added at least two new teams or the equivalent of two teams worth of participants in the last 10 years.

Lastly, and probably the most complicated, is part three: the full and effective accommodation of the interests and abilities of the underrepresented sex. For this, a review of the club and intramural sports on campus, what sports conference peers are offering, and what the institution’s feeder schools are offering should provide a solid start. Aligning those three buckets should give an institution a sense of what it should be offering in its athletic portfolio. This summary is not meant to be a be-all and end-all, but to serve as a starting point when starting to assess Title IX compliance.
Title IX’s application to intercollegiate athletics is complicated. Navigating the legal and statutory landscape can be tricky. While this article was not meant to be an exhaustive Title IX analysis on any one institution, it was meant to serve as a high-level practitioner's guide for gauging compliance at their own institution. This approach was grounded in the reality of the kinds of mechanisms the courts and the Department of Education have used when examining any institution regarding Title IX compliance. Institutions should take an approach that makes the most sense for them and takes into account the context on their campuses while adhering to the statutory and judicial guidance available.